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No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

In this action appellee recovered judgment on a life insurance policy because of the death of the insured in an aeroplane accident.

Two defenses were offered:

First. That the evidence is insufficient to show that the insured was a fare paying passenger; and

Second. If a fare paying passenger, recovery cannot be had in this action because the pilot of the plane was not licensed as required by the Air Commerce Act.

"The Courts have announced a rule to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises

> in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed."
>
> 14 *California Jurisprudence,* page 445.

This action is not based on the contract of carriage between the deceased and the pilot of the aeroplane, but rests entirely on the contract of insurance.

To entitle appellee to recover, it was only necessary to show that death resulted from bodily injury sustained by the insured as a fare paying passenger.

The intent of this clause of the policy was to avoid any liability on the part of the appellant in the event that the insured was riding for pleasure or in operating an aeroplane. The intention of the policy is fully subserved when it appears that the insured was a fare paying passenger. This is all that appellee was required to establish to recover from appellant.

THE DECEASED WAS A FARE PAYING PASSENGER.

The undisputed evidence shows that Ollie Rose was the owner of two aeroplanes which he let out for public hire. He had used one plane for this purpose for over two years and the other for a little over a year. These planes were used commercially at Red-

ding. He was running a school for students and any jobs that he could pick up. The business was known as the "Rose Air Service" and was also advertised as such. Tickets were sold to prospective customers at the air port.

(Record pages 96 and 97.)

The planes were rented out in the field to go any where any one wanted to go.

(Record page 98.)

Also for the purpose of taking passengers up in the air for short flights.

The deceased, George Halcomb, with other members of his family, was a passenger on one of these aeroplanes about two months prior to the accident and paid for his transportation.

(Record page 100.)

On the day of the accident, Halcomb visited the home of Rose and stated to him "You know my brother is lost, and I came down to see if you would take me up in the plane, I thought we might be able to see him up from the air". Rose agreed to go.

The evidence does not show that Halcomb was ever transported by Rose gratuitously. Nothing was mentioned in reference to the price or fare to be charged, nor did Halcomb say that he would make arrangements for the latter.

(Record page 102.)

The testimony of a brother of the deceased shows that on a former occasion Halcomb paid for his transportation.

(Record pages 105, 106 and 107.)

So we have the situation of Rose carrying on the business of transporting passengers for hire at a public air port in the Town of Redding; that he advertised his business as such; that the deceased always paid Rose for his transportation; that there was nothing in the relations of the parties or otherwise upon which to base any implication or assumption that any transportation would be rendered by Rose to Halcomb gratuitously.

The contract was created by the consent of the parties and is not one imposed by law from motives of public policy frequently against the intention of the parties.

Nevada Co. v. Farnsworth, 89 Fed. 164.

> "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied."
>
> *Young v. Bruere,* 78 Cal. App. 132.

> "An implied contract arises from the request of one party and performance by the other, though the request is often inferred from the circumstances attending the performance."
>
> *Rebman v. San Gabriel v. L. & W. Co.,* 95 Cal. 393.

> "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words."
>
> *Dunham-Carrigan-Hayden Co. v. Rubber Co.,* 84 Cal. 673.

In *United States Fidelity & Guaranty Co. v. Aschenbrenner,* 65 Fed. (2d) 976, the Court quotes from the case of *Purple v. Union Pac. R. Co.,* 114 Fed. 123, which holds as follows:

> "This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards destination. See, also, Fels v. East St. Louis & S. Ry. Co. (C. C. A. 8), 275 F. 881-883; Pere Marquette R. Co. v. Strage, 171 Ind. 160, 84 N. E. 819, 821, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041."

The evidence shows that Rose was engaged in the operation of an aeroplane for hire. It also shows that on previous occasions the deceased had been a passenger on these planes, and on one occasion was a passenger on a plane operated by Rose and paid him a fare.

Under the circumstances, the law will presume that Halcomb was a passenger for fare.

10 *Corpus Juris,* page 1040.

The fact that he was in an aeroplane used for the service of the public for hire and under the circumstances shown by the record justifies the conclusion *prima facie* that he was a passenger.

People v. Douglass, 87 Cal. 284;

4 *Ruling Case Law,* page 1015.

A passenger is one who travels in some public conveyance by virtue of a contract, express or implied as to the payment of fare or which is accepted as the equivalent therefor.

Georgia & F. R. Co. v. Tapley, 1916 C, L. R. A., page 1020.

We quote the following from Sections 487 and 488 of 4 *Ruling Case Law,* pages 1028 and 1029:

> "Every one not connected with the carrier and traveling openly by a passenger conveyance, is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable when called on to pay, his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser."
>
> "The usual rule applies that the presumption is always in favor of honesty and fair dealing, and he who asserts the contrary must prove it."
>
> "The question whether one is a passenger is one of mixed law and fact. What facts will create the contract relation of carrier and passenger is a question of law, but the existence or non-existence of such facts in each particular case is where there is a conflict of evidence on the point, a question of fact to be determined by the jury, and not one of law to be passed upon by the court."

That the evidence brings the case within the rule of implied contracts cannot be disputed. Rose performed the service for Halcomb; it was a useful service of a character usually charged for, and Halcomb expressed no dissent to any charge, but availed

himself of the service; a presumption to pay the reasonable value of the services is therefore implied.

The determination of this question of fact rested with the jury. The verdict of the jury in this case is fully sustained by evidence bringing the case within the rule of implied contracts announced in the foregoing authorities.

The making of this contract as decided in the case of *Dunham-Carrigan-Hayden Co. v. Rubber Co.,* supra, may be inferred by proof of conduct, as well as by proof of the use of words.

The appellant makes the point that a contract cannot be implied where the subject matter is illegal. The argument ignores the distinction between contracts implied in fact and implied in law. The distinction is well stated in *Nevada Co. v. Farnsworth,* 89 Fed. 164, as follows:

> "The whole theory of contracts implied in law was originated for the purpose of giving a remedy ex contractu for certain wrongs, and it does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties."

The same distinction is discussed in 13 *Corpus Juris,* pages 240 to 244. A contract implied in fact rests upon the assent of the parties. Contracts implied in law do not arise from consent of the parties, but from the law or natural equity. The latter class

is created by the law without regard to the assent of the parties and is dictated by reason and justice and rests solely on legal fiction. They are not contractual obligations at all in the true sense for there is no agreement, either express or implied.

Ignoring this distinction, a number of cases are cited in appellant's brief, to support the argument that the law will not imply a contract where the subject matter is illegal. For instance, the cases cited on page 12 of the brief are in support of the rule that a contractor cannot recover if he is not licensed as required by law. In these cases there was an express contract and it was sought to evade the illegality thereof by having the Court imply a contract as a matter of law to afford the plaintiff a remedy.

The case of *Zottman v. San Francisco,* 20 Cal. 97, involved an unauthorized contract of a corporation, and it was sought to recover on an implied obligation. The Court very properly held that the law would not imply an obligation to do that which it forbids the party to do what it agreed to do.

The Air Commerce Act does not forbid the making of any agreement of carriage, but only imposes a civil penalty on the pilot who operates without a license, which penalty may be remitted or mitigated by certain officials.

It is not a case of "where the law expressly forbids a person to perform services for compensation and expressly permits him to perform them without compensation".

As held in *Williams Stake Co. v. Roth,* 154 N. Y. S. 213, cited on page 14 of appellant's brief, there is nothing in the law providing that there cannot be a fare paying passenger except in an aeroplane operated by a licensed pilot.

THE FACT THAT ROSE, THE PILOT OF THE AEROPLANE HAD NO LICENSE DOES NOT BAR A RECOVERY BY APPELLEE.

The appellee insists that the right to recover because of the alleged illegality of the contract of carriage is not involved in this action because the appellee is not recovering on that contract.

The action is based on a contract of insurance, and all that is required by the terms of that contract is to show that the deceased was a fare paying passenger.

We will assume for the sake of the argument that the question of the illegality of the contract may be raised by the appellant, still that rule is not applicable to this case.

As stated, the only penalty provided by the Air Commerce Act for the navigation of an aeroplane without a license is "a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe".

United States Code Annotated (Sup. 1933), Section 181.

There is nothing in the Statute providing that the violation of any of its terms will invalidate a contract, or forbidding that a contract of carriage may be made by such pilot, or making the act of a passenger unlawful in riding with an unlicensed pilot.

The rule as to the enforcement of unlawful contracts is not applied for the benefit of either party to the contract, but as a matter of public policy.

Harris v. Runnels, 13 L. Ed. 901; 12 Howard 78.

The appellant is relying upon the general rule that an illegal contract is void and unenforceable, but ignores the many exceptions to that rule.

We take the following quotations from *Dunlop v. Mercer,* 156 Fed. 545 (555-557):

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.
>
> There is no declaration in the statute that contracts of unqualified corporations doing business in the state without complying with the prescribed conditions shall be void. So far as we are able to ascertain, the Supreme Court of the state has never held that such was the meaning or the

> effect of the law. If that had been the purpose of the Legislature, it would have been easy to have made it manifest. A single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose, and it is not the province of the court to inflict more by construction. If contracts in violation of this statute are void, they are absolutely void, and none of the parties to them can enforce them. Such a result is unjust, inequitable, and inconsistent with the purpose of the law."

This statute imposes no specific penalties for its violation. The act is not *malum in se.* The purpose of the statute can be accomplished without declaring contracts in violation thereof illegal. In such case, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.

This subject is elaborately considered and the authorities reviewed in *In re T. H. Bunch Co.,* 180 Fed. 527. That was an action involving the right of a carrier to recover on certain bills of lading which were handled by the carrier in a manner violating the statute by delivering the property transported without surrender and cancellation of the bills. We quote the following from the decision:

> "Does this statute prevent a recovery by the carrier of the value of property delivered in violation thereof and by the receiver converted to his own use? While there is some conflict among the decisions of the state courts as to the effect of an act not malum in se but only malum

prohibitum, the decisions of the national courts are practically unanimous that there is an important distinction. United States v. Bradley, 10 Pet. 343, 360, 9 L. Ed. 448; Spring Company v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Ewell v. Daggs, 108 U. S. 143, 150, 2 Sup. Ct. 408, 27 L. Ed. 682; Dunlop v. Mercer, 156 Fed. 545, 555, 86 C. C. A. 435.

In Ewell v. Daggs the court said:

> 'A distinction is made between acts which are mala in se, which are generally regarded as absolutely void in the sense that no right or claim can be derived from them, and acts which are mala prohibitum, which are void or voidable according to the nature of the thing prohibited.'

There is another equally well settled rule of law so far as the national courts are concerned. When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.

The rule to be deduced from these authorities is that, when such a plea of illegality is set up, the court must examine the entire statute in order to discover whether or not the Legislature intended to prevent courts of justice from enforcing contracts based on the act prohibited, and unless it does so appear only the penalties imposed by the statute can be enforced.

It was no doubt supposed that these heavy penalties would deter carriers and their agents

from violating the statute, and the liability of the carrier for the loss sustained by purchasers of the bills or warehouse receipts would protect them, and thus remedy the mischief then prevailing. To impose the additional liability on the carrier of depriving him of the right to maintain an action for the goods obtained without surrender of the bill of lading or the value if converted was evidently not deemed necessary, for it would award a premium to one of the wrongdoers and add to the severe punishment of the carrier provided by the statute. Courts should place no such construction on the act unless this intention is clearly expressed in the act."

In re T. H. Bunch Co., 180 Fed. 527:

"It is the contention of appellant that the effect of article 4954 is to render void, or at least unenforceable for its full amount, a life insurance policy issued in this state to one aged 64 years, at the premium rate for one aged 48 years. Such a policy contract does contravene the prohibition against discriminations between policy holders; but it does not necessarily follow that the courts will adjudge it void or refuse to enforce it. The effect of the statute on the forbidden contract depends on the legislative intent.

The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the legislature meant for only the statutory remedies to be applied, and it did not mean for courts

to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. Harris v. Runnels, 12 How. 79, 13 L. Ed. 901.

The language of the statute shows that the Legislature did not regard the insured and the insurer as in pari delicto in making the contracts sought to be prevented. The insurer and the insurer's agents are alone to be punished, and are alone expressly subjected to forfeiture. The command to refrain from the discriminatory acts is addressed to the insurance companies alone.

We sanction the declaration of Judge Selden, quoted with approval in a later opinion of the New York Court of Appeals, that—

> 'It is safe to assume that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as pari delictum'. Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 145; Irwin v. Curio, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 832.
>
> It would not be in accord with either the public policy declared by the act wherein the statute is found or the ends of justice to permit insurance companies to issue discriminatory policies of life insurance and collect and retain the premiums thereon and to then refuse payment after the death of the insured."
>
> *American Nat. Ins. Co. v. Tabor,* 230 S. W. 399.

When a criminal statute imposes specific penalties for its violation, where the act is not *malum in se,* and the purpose of the statute can be accomplished without declaring contracts in violation thereof ille-

gal, the inference is that it was not the intention of the lawmakers to render such contract illegal and unenforceable.

Guffey-Gillespie Oil Co. v. Wright, 281 Fed. 787.

Appellant quotes the decision of the Supreme Court in *Miller v. Ammon,* 145 U. S. 421, 36 L. Ed. 759, on page 27 of its brief, but omits all reference to the exceptions to the rule which are recognized in the opinion.

The Court quotes with approval from *Harris v. Runnels,* above cited.

As stated in *In re T. H. Bunch Co.,* while there is some conflict among the decisions of the state Courts as to the effect of an act not *malum in se* but only *malum prohibitum,* the decisions of the national Courts are practically unanimous that there is an important distinction.

The United States Supreme Court in *Yates v. Jones National Bank,* 51 L. Ed. 1012; 206 U. S. 158, says:

> "Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed by the statute is the exclusive test of liability."

The appellant relies upon the case of *Smith v. Bach,* 183 Cal. 259, but this decision is in harmony with the cases we have cited. It must be read in the light of the statute before the Court. It arose out of a contract for the sale of certain lands in a subdivision in San Diego County. Plaintiff paid a part of the purchase price under the terms of the contract of sale, and sued to recover the same upon the ground that the contract

relating to the sale was void. This invalidity was based upon the Act of March 15, 1907 (Statutes 1907, page 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map. Section 8 of this Act specifically provided that "No person shall sell or offer for sale any land or parcel of land by reference to any map or plat unless such map or plat has been made, certified, endorsed, acknowledged and filed in all respects as provided in this Act, etc."

Here we have the instance of an express provision in the statute prohibiting the making of the contract involved in the action.

We quote the following from page 262 of the opinion:

> "For the purpose of ascertaining the legislative intent, courts should consider the entire statute, and if from such consideration it is manifest that the legislature had no intention of declaring a contract void, they should be sustained and enforced, otherwise they should be adjudged void. (Dunlop v. Mercer, 156 Fed. 548 (86 C. C. A. 435).) Here it is manifest from a reading of the entire act that the statute in question was passed for the protection of the public and not as a revenue measure. (King v. Johnson, 30 Cal. App. 63 (157 Pac. 531).) In such a case a contract made in violation of its terms should be held to be void. (Levinson v. Boas, 150 Cal. 193 (11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825); Pangborn v. Westlake, 36 Iowa 548.) The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not ex-

pressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. A statute of this character prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way. (13 Cyc. 351; 13 Corpus Juris, p. 410.) The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. (Berka v. Woodward, 125 Cal. 127 (73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777), and cases cited; Bentley v. Hurlburt, supra.)

It is true as stated by Mr. Justice Sloss in Bentley v. Hurlburt, that cases may be found holding a contrary doctrine, but an examination of those cases will, as hereinbefore stated, show that the statutes upon which they are based, generally do not prohibit, but merely impose, a fine as an exclusive punishment."

This decision is in harmony with the other authorities pointing out the distinction where the contract is prohibited by statute and where there is no prohibition, but simply a fine as a punishment.

The act in question does not make it a crime nor prescribe any punishment other than the civil liability for the violation of any of its provisions.

This statute permits the doing of the act by paying the penalty which is a species of license money exacted for the privilege of doing the act, and no other act is made unlawful by the statute.

6 *Ruling Case Law*, page 704.

> "When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."
>
> *Berka v. Woodward,* 125 Cal. 126.

Before a Court should declare a contract not *malum in se* opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited and that such advantage is not merely theoretical or problematical.

Cox v. Hughes, 10 Cal. App. 563.

> "Where a statute commands certain parties to do certain acts and prescribes the penalties for their violation of its command, it is not the province of the courts to inflict other penalties upon innocent parties not named in the law on account of such a violation."
>
> *Hanover National Bank v. First National Bank,* 109 Fed. 426.

HALCOMB WAS NOT IN PARI DELICTO WITH ROSE.

Halcomb had every reason to assume that Rose was lawfully engaged in business. There is nothing to sustain an inference that Halcomb either knew or had any reason to know that Rose was operating without a license. Rose had publicly carried on the business of transporting passengers at the Redding Air Port in a manner indicating that his business was lawful.

While, of course Halcomb was presumed to know the law, it does not follow that he should be assumed to have known the fact that Rose had violated the law. This rule is very clearly stated in the case of *Becker v. Stineman,* 115 Cal. 745, as follows:

> "Based upon the findings of the court the evidence discloses facts similar to those in the case of Hammeon v. Amalgamated Copper Mines Co., 95 Cal. App. 400 (273 Pac. 74), which was an action to recover from defendants on certain promissory notes issued by them in violation of a permit of the corporation commissioner. Defendant claimed and cited authorities holding that while one who has received the benefit of an illegal private contract is estopped to plead its invalidity, such rule does not apply to contracts which are void as against public policy. The trial court there found that the respondent had no knowledge of the failure to obtain a permit, but it was argued that she must be presumed to have known the law and that the notes were void, and that having failed to demand proof of the existence of a permit respondent passively if not actually became a participant in violating the law. The court held that it was true that respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be assumed to have known the fact that appellant had violated the law. Respondent was entitled to assume that the law had been complied with. In such a case the complaining party is protected, the prohibition being for his benefit and not being *in pari delicto* he is entitled to relief. (13 Cor. Jur. p. 501, sec. 443.)

> It is the duty of the court in furtherance of justice to aid one not *in pari delicto* though to some extent involved in the illegality, but who, as here found, is comparatively the more innocent and to permit him to recover back the property or its value as the circumstances of the case may require. (Hemmeon v. Amalgamated Mines Co., supra, at p. 402.)"

It cannot be held that Halcomb was *in pari delicto* in any respect whatever in the absence of evidence showing that he knew that Rose was operating without a license.

As held in this case, Rose was entitled to assume that the law had been complied with and "in such a case the complaining party is protected, the prohibition being for his benefit and not being *in pari delicto* he is entitled to relief".

In *Colby v. Title Ins. and Trust Co.,* 160 Cal. 640, it was asserted that the consideration for the execution of the instrument involved therein was the compounding of a felony and therefore an illegal consideration, all the parties, including the plaintiff, were *in pari delicto,* and that under such circumstances equity would not lend its aid to any of the parties. After deciding that as a general rule, Courts will not aid one party or another to an illegal transaction where they stand *in pari delcito,* the Court holds as follows:

> "But this rule only applies where the parties are *in pari delicto*—where the illegal transaction is entered into voluntarily and the turpitude of the parties is mutual. Where, in the cases cited,

> the rule has been applied, it will be found that both parties entered into the illegal contract or transaction there under consideration voluntarily, were equally culpable, and relief was refused on that account."

Several authorities are quoted in the opinion sustaining the rule and holding that the parties are not *in pari delicto* unless they were equally in fault.

It must appear that the parties to the illegal contract are *in pari delicto* and equally in fault.

Witham v. Allen, 130 Cal. 199.

> "If the parties are *in pari delicto,* the law will help neither, but leaves them as it finds them. But if two persons are in delicto, but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter."
>
> *Daniels v. Tearney,* 102 U. S. 416 (421), 26 L. Ed. 189.

The Court in its opinion also cites the following rule from *Story on Contracts:*

> "If the contract be executed however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege."

Here we have the anomalous situation of this appellant which was not a party to the contract trying to

take advantage of one who was a party to the contract.

> "All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into *by both* the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom. Leg. Max. 732." (Italics ours.)
>
> *Ewell v. Daggs,* 108 U. S. 142 (149), 27 L. Ed. 683 (684).

For a general discussion of the rule, see the following text books:

1 *Pomeroy's Equity Jurisprudence,* Section 403;
2 *Elliott on Contracts,* page 1103;
6 *Ruling Case Law,* page 833.

Counsel seek to distinguish some of the cases by arguing that the innocent party in such case was permitted to recover the money with which he parted on the basis of the illegal contract, but the argument ignores the proposition that the principle underlying these decisions is that the parties were not *in pari delicto.*

There seems to be no conflict between the State and Federal authorities on the subject of the exceptions to the rule and when it will be applied by the Court as a matter of public policy. It is not a question of the law of contracts, but a question for each Court to decide as to whether the contract will or will not be

enforced on the grounds of public policy, or that it is illegal.

Consequently, we feel that it is unnecessary to burden the Court with any detailed analysis of the authorities cited by the defendant.

In cases arising from violations of the liquor laws, the Courts have construed the statute as meaning that the law makers did not intend that the contracts forbidden by the regulations should be as valid as though there were no such regulations. In these cases, Courts recognize the exceptions to the general rule, but hold that under a proper construction of the statute, such violations are not included within the exceptions, but are governed by the general rule.

We respectfully submit that for the following reasons the plaintiff is entitled to prevail:

First. It cannot be assumed that Halcomb knew that Rose had violated the law by operating without a license.

Second. Halcomb was entitled to assume that the law had been complied with.

Third. Halcomb was not *in pari delicto* and is therefore entitled to relief.

Fourth. The statute does not prohibit the making of contracts of carriage.

Fifth. The general rule that an illegal contract is void is not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a

penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the Courts to affix additional penalties not directed by the lawmaking power.

Sixth. There is no declaration in this statute rendering any contract of carriage invalid. If such had been the intent of the Legislature as decided in *Dunlop v. Mercer,* a single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose and it is not the province of the Court to inflict more by construction.

Quoting from that opinion, to give such construction to this statute, by the appellant not a party to the contract attempting to defeat a recovery on this life insurance policy would bring about a result "unjust, inequitable and inconsistent with the purpose of the law".

Seventh. Halcomb was a passenger.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE SHOWING THAT HALCOMB HAD PREVIOUSLY PAID ROSE FOR TRANSPORTATION.

It is argued on page 29 of the brief that the Court erred in permitting proof of the fact that Halcomb had on one occasion paid Rose a fare was inadmissible.

Primarily this evidence was admissible to show that the service rendered Halcomb was of a character for which a charge was usually made, and for which a charge was made. It was admissible in connection with all of the other evidence showing the existence of the Redding Air Port; that Rose was engaged in the general passenger business; advertised as such; held himself out as a person engaged in commercial aviation for a profit, and that he charged therefor. All of these circumstances were proper to be considered by the jury in determining the question of implied contract. Particularly that "it was a useful service of a character usually charged for", as held in *Young v. Bruere,* 78 Cal. App. 132. It was admissible as a part of the conduct of the parties involved from which the jury could infer that there was an implied agreement to pay the reasonable value of the transportation.

It was admissible to establish that the services having been rendered, the law would imply an agreement to pay at least the reasonable value thereof.

Semi-Tropic Assn. v. Johnson, 163 Cal. 642.

It was also admissible under the rule stated in *Larson v. Larson,* 72 Cal. 169, cited by appellant, on the issue of the illegality of the contract and as bearing upon the proposition that Halcomb was not *in pari delicto.* It was competent to show the doing of the same or a similar act as bearing on his good faith and innocent intent.

Presumptions are indulged to support the absence of facts and are the weakest sort of evidence.

Williams v. Hasshagen, 166 Cal. 386.

The only issue submitted to the jury was that of implied contract. This evidence was competent and material on that issue. It was a fact proper for the jury to consider in drawing the inference as to the implied agreement to compensate Rose for the transportation in the absence of evidence showing an express agreement.

Assuming that the presumption of innocence and that the law has been obeyed are applicable as argued by the appellant then this evidence was admissible to overcome these presumptions by showing an agreement, express or implied, that Halcomb was a fare paying passenger.

The appellant is entirely in error that the mere absence of an express agreement to pay fare is conclusive and that the case is controlled solely by these presumptions and that the evidence was not admissible on the issue of implied contract to pay a fare.

THE COURT DID NOT ERR IN RULING ON THE INSTRUCTIONS TO THE JURY.

The first error assigned by the appellant in connection with the instructions is the refusal of the instruction printed on page 31 of the appellant's brief. First, the instruction was not proper because it stated that

> "The fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not jus-

tify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question."

This portion of the instruction took from the jury the right to consider the former collection of fare and bearing on the proposition of an agreement, express or implied to pay the reasonable value of the transportation involved in this action. It is contrary to the rule that the presumption cannot be applied where there is evidence to the contrary.

In the concluding portion of the instruction, the Court was asked to instruct the jury that in the absence of evidence as to whether a fare was charged or paid

> "*It must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation* for the aeroplane flight on which the said George R. Halcomb was killed."

This is an instruction on the facts and would take from the jury the right to decide whether or not such presumption was overcome by the proof, and established by proof that there was an express or implied agreement to compensate Rose.

This is a question for the jury.

Volquards v. Meyers, 23 Cal. App. 504.

The instructions printed on page 32 of the appellant's brief correctly stated the law and did not permit the jury to disregard any presumption declared by law.

The Court also instructed the jury

> "In this connection you may consider also the fact that Rose was not a licensed transport pilot, although the presumption is that he did not take up passengers for hire in violation of the regulations of the Department of Commerce."
>
> (Record, page 129.)

The Court properly left the whole question of fact involving the evidence and the presumptions to the jury in accordance with the well established rule.

CONCLUSION.

The policy does not provide that "a fare paying passenger" is one who has paid a fare under a legal contract of carriage. The policy covered the risk of being a passenger in a commercial aeroplane.

All of the argument of the appellant is ably and conclusively answered by the memorandum opinion of the late Hon. Frank H. Kerrigan, the trial judge, appearing on page 64 of the record.

The issue submitted to the jury was the question of fact as to Halcomb being a fare paying passenger. All other questions were determined by the Court.

If the position of the appellant is sound, then no action could be based upon a contract of carriage by a ship if it appeared that it was being operated by an unlicensed master nor on a contract of carriage entered into by a passenger with a railroad company

where it appeared that the railroad company had failed to comply with some provision of law connected with the operation of its trains, or that the trains were being operated in an unlawful manner.

We repeat that the defense relied upon is not available to the appellant, and if available, the Court will not deny relief to the beneficiaries of this policy in the face of the fact that the deceased acted in good faith, had every reason to believe that he was flying in a commercial aeroplane.

The evidence clearly brings the case within the provision of the policy with reference to the insured being a fare paying passenger.

As stated in the opinion of Judge Kerrigan that

> "To hold that it did not make the deceased a fare paying passenger would twist language beyond its plain meaning," and
>
> "It would involve rewriting the exception in the insurance contract to provide that the insured must be 'a fare paying passenger upon an airplane operated by a duly licensed transport pilot'."
>
> Also "that would be a narrowing of the risk by interpretation contrary to the principle of law that insurance contracts are construed in case of doubt against the insurer who wrote the instrument".

We therefore respectfully submit that the judgment should be affirmed.

Dated, Woodland, California,
March 29, 1935.

Respectfully submitted,
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